1980

Nanette Dixon, Val Humpherys and Carrie Humpherys v. William Stoddard and Darlene Stoddard : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

NANETTE DIXON, VAL HUMPHERYS, and CARRIE HUMPHERYS, Plaintiff-Appellant,	)	
vs.	)	Case No. 16876
WILLIAM STODDARD and DARLENE STODDARD, Defendants-Respondents.	)	

BRIEF OF APPELLANT

Appeal from the Judgment of the First District Court
in and for Box Elder County
Honorable Ted S. Perry

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APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action by the heirs to enforce a promissory note.

DISPOSITION IN LOWER COURT

The case was tried to a jury which rendered a verdict that there was a material and fraudulent alteration in the promissory note.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order reversing the District Court and entering Judgment for plaintiff for the amount of the unpaid balance of the note plus interest and costs, or,

in the alternative, ordering a new trial.

STATEMENT OF FACTS

This is an action by the heirs of Glen S. Humpherys to enforce a promissory note (Exhibit P-2) dated December 30, 1967. The promissory note was given to Glen S. Humpherys as part of an agreement (Exhibit P-3) between defendant and Glen S. Humpherys in accordance with which Glen S. Humpherys sold and delivered to defendants his drug store inventory, prescription inventory, and prescription files.

The agreement provided that an inventory be taken of the drugstore items by "The Rocky Mountain Wholesale Inventory Crew" and the value determined to set the sales price, part of which was to be paid by deffered payment as provided in the note (Exhibit P-2).

The defendants made periodic payments to Glen S. Humpherys from February 2, 1968, until April 30, 1975, when Mr. Humpherys died. Defendant then made payments in May, June, August, September and November of 1975 to Glen S. Humpherys' heirs, at which time defendants refused to make additional payments. The unpaid balance of the note, as found by the jury, was $12,693.81. (R. 113)

During the course of the trial, the defendants were permitted to testify that the promissory note in question was signed by them at a time when the amount of the note was blank

and that they did not know who completed the blanks. The plaintiff objected to the questions giving rise to the above testimony, on the ground that the defendants were not competent to be a witness to such facts as provided by Section 78-24-2 UCA 1953 (the dead man's statute). (T-27-29)

After both sides had rested their respective cases, plaintiff made a motion for a directed verdict which was taken under advisement.

The following jury instruction to which plaintiff took exception was given:

> "The Plaintiffs claim that the Defendants, on or about December 30, 1967, executed and delivered to Glen S. Humpherys a promissory note, and that the Plaintiffs are the owners and holders of said note because of the death of Glen S. Humpherys. The Plaintiffs further claim that there is a balance owing on the note which has not been paid.
>
> "The Defendants admit that they signed the promissory note in blank, that the amount and date of the note were not filled in at the time the Defendants signed the same. The Defendants claim that the amount and date of the note were filled in without their knowledge or permission.
>
> "You are instructed that any alteration of a promissory note is material which changes the contract of any part thereto in any respect, including any such change in an incomplete instrument, by completing it otherwise than as authorized. But there is no material alteration of a promissory note if the holder completes an incomplete instrument as authorized by the maker or makers.
>
> "You are further instructed that fraudulent consists of some deceitful practice or willful device resorted to with intent to deprive another of his right or in some manner to do him an injury." (R. 100)

The case was submitted to the jury on a special verdict. Question No. 1, to which plaintiffs took exception, was as follows:

> "Was there any fraudulent and material alteration of the promissory note now bearing date of December 30, 1967, by the plaintiffs, or any of them, or by Glen S. Humpherys:
>
> ANSWER 'YES' or 'NO': Yes."

The special interrogatory was answered in the affirmative.

The other special interrogatories and the answers as found by the jury are as follows:

"Question No. 2:

> "State how much money, if any, has been paid to Glen S. Humpherys or to the plaintiffs on the note bearing date of December 30, 1967, by stating the amount paid on
>
> A. The Principal $ 12,496.93
>
> B. The Interest $ 6,197.73
>
> and give the date and amount of the last payment on

	Amount of Last Payment	Date of Last Payment
A. The Principal	$ 35.11	11/1/75
B. The Interest	$ 64.89	11/1/75

"Question No. 3:

"Give the amount of a reasonable attorney's fee for bringing this action.

$ -0-."

The following was added by the jury without instruction and not responding to any special question:

> "We recommend that plaintiff remove the items in question from the basement of Mack's Pharmacy. We also feel that plaintiff does not have a valid case because of insufficient evidence." (R. 113)

The jury ruled that there was a fraudulent and material alteration of the promissory note in question. Plaintiff made a motion for a judgment notwithstanding the verdict and for a new trial based upon admission of evidence which should have been excluded by Section 78-24-2, UCA 1953, and that the defendants, after admitting their signatures, had not introduced any evidence to prove that there was an unauthorized completion of the promissory note in question. (R. 115)

The motions were denied by the trial judge and a memorandum decision was issued. (R. 133) The decision stated in part..."no evidence was presented as to any inventory being taken and the jury could believe the amount on the note was entered without authority".

Prior to and during the time this lawsuit was pending, plaintiff had been searching for the evidence of the inventory. (See Affidavit of Nanette Dixon). On February 3, 1979, after the case had been appealed, plaintiff discovered the evidence which set forth the inventory, including the original adding machine tapes made in the inventory process and the summary, hereafter referred to as "new evidence", the originals

of which are attached to the affidavit of Mr. G. Don Kennedy which is filed to support plaintiffs' motion to vacate the judgment and for an order for a new trial. All of these documents are filed with plaintiffs' motion to stay the appeal pending a ruling by the district court to vacate the judgment and for a new trial or in the alternative to dismiss the appea without prejudice to another appeal on the same issues after disposition of plaintiffs' motion for a new trial in the district court based upon the ground of newly discovered evidence and upon the ground that the Judgment should be vacated in the interest of justice in view of the newly discovered evidence. (R. 152)

Because an appeal was pending at the time the above motion was filed, Plaintiff made a motion to the Supreme Court to dismiss the appeal without prejudice to another appeal after consideration of plaintiffs' motion. This motion was granted, after which the trial court denied plaintiffs' motion for a new trial (R. 181) on the grounds that the newly discovered evidence could have been discovered by due diligence and that the new evidence would not have changed the result.

ARGUMENT

I

THAT THE JURY'S SPECIAL VERDICT WAS NOT SUPPORTED BY COMPETENT EVIDENCE

A. THAT THERE WAS NO FRAUDULENT AND MATERIAL ALTERATION.

The promissory note in question is typed with lines provided for the amount, both numerically and written out, and for the date. These items have been written in in pen and ink. There is no indication of erasures, alterations, cross-outs, or other changes. There is nothing to indicate an improper or unauthorized completion. It is common practice to negotiate checks and other negotiable instruments completed in such a fashion. That is, with the amount or date, or both, completed by typewriter, rubber stamp, or in handwriting obviously different than the signature on such document.

Section 70A-3-307 UCA 1953, Subsection (2) provides:

> "When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense."

In the instant case, defendants admitted that they signed the promissory note in question. The above quoted section therefore places the burden of proving a defense on the defendant. This is consistent with general case law.

In Section 652 of 11 CJS 45, it is stated:

> ".... it is presumed that notes valid on their face were executed without fraud on the part of the payee...."

and further it is stated:

> "The burden of proof on issues raised by defendant's denial of the validity of the instrument is on him where he admits execution thereof...."

Defendants, as a defense, have asserted that the note was signed in blank and that the completion of the blanks by whomever made, was unauthorized. Incomplete instruments are discussed in Section 70A-3-115 UCA 1953:

> "70A-3-115. Incomplete instruments. ---(1) When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect, it cannot be enforced until completed, but when it is completed in accordance with authority given, it is effective as completed.
>
> "(2) If the completion is unauthorized, the rules as to material alteration apply (section 70A-3-407), even though the paper was not delivered by the maker or drawer; but the burden of establishing that any completion is unauthorized is on the party so asserting." (emphasis added)

In view of the above, the statutory law of Utah grants recovery by plaintiff on a promissory note even if incomplete when signed by defendants unless defendant can establish a defense. The statute places the burden of proving that any completion is unauthorized squarely on the defendants as they are asserting that the blanks were completed without authority.

"The purpose of a trial of the issues is to have the facts determined impartially and fairly by a court or jury. Jurors as well as judges must base their verdicts or decisions on the evidence presented during the trial, not on the basis of some independent personal investigation or determination of the facts outside of court."

Provo River Water Users Association vs. Carlson, 6 U 2d 161, 308 P2d 264, p. 782.

B. THAT THE EVIDENCE THAT THE PROMISSORY NOTE WAS SIGNED IN BLANK WAS NOT COMPETENT.

During the trial the only evidence of unauthorized completion introduced by defendants was in response to questions relating to the execution of the note and to other statements, transactions, and matters of fact equally within the knowledge of the defendants and Glen S. Humpherys who died May 7, 1975, and who is the payee of the promissory note in question and from whom plaintiffs inherited said note.

Section 78-24-2 UCA 1953, also referred to as the "dead man's statute" is set out below, with emphasis added:

"78-24-2. Who may not be witnesses. ----The following persons cannot be witnesses:

"(1) Those who are of unsound mind at the time of their production for examination.

"(2) Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

"(3) A party to any civil action, suit or proceeding, and any person directly interested in the event thereof, and any person from, through or under whom such party or interested person derived his interest or title or any part thereof, when the

adverse party in such action, suit or proceeding claims or opposes, sues, or defends, as guardian of an insane or incompetent person, or as the executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian, assignee or grantee, directly or remotely, of such heir, legatee or devisee, as to any statement by, or transaction with, such deceased, insane or incompetent person or matter of fact whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent or deceased person, unless such witness is called to testify thereto by such adverse party so claiming or opposing suing or defending, in such action, suit or proceeding."

Plaintiffs objected to the answering of the questions concerning the form of the note when executed and to other questions relating to the completion of the note or to authorit for completing the note on grounds of defendants' incompetency based on the dead man's statute quoted above. (T. 27 and T. 57 All of defendants' testimony concerning the completion of the note was of such a nature as to have been equally within the knowledge of defendants and the dead man, Glen S. Humpherys, and should have been excluded.

The application to the facts of the instant case is a classic example of the reasons for the enactment of the dead man statute. The promissory note in question is regular upon its face and under the statute cited is enforceable by plaintiffs upon proof of the signatures. The evidence of almost eight (8) years of payment, (Ex. P-4 and 5), the admission by defendant that he had deducted interest for this loan from his tax return (T. 34), together with the lack of any evidence that

that defendants acted otherwise than as though they were obligated on the note until Mr. Humpherys' death further reinforces the validity of the note. Allowing defendants to testify that the note was blank when signed or completed without authority circumvented the dead man's statute as such matters were equally within the knowledge of defendants and the deceased. This is the kind of evidence intended to be inadmissible as it is self-serving, for defendants' benefit, and impossible for the plaintiffs to counter without the testimony of the deceased payee. In such cases, the legislature, by enacting Section 78-24-2 UCA 1953, has set forth the basic policy to protect heirs of deceased persons from being subject to evidence that they cannot possibly meet because of the death of their only witness.

A similar situation results when one is a holder in due course. Section 70A-3-407 UCA 1953, expressly states that a holder in due course may enforce an instrument which has been completed after execution as it is completed. Further, a person who by his negligence substantially contributes to an alteration is precluded from asserting the alteration against a holder in due course. See 70A-3-406 UCA 1953.

The statutory law relating to a holder in due course is another example of the legislature enacting statutes to protect persons from the unfair position of defending against an asserted fact which such person has no chance to prove. As with the dead man's statute, the legislature has decided that

the benefit of the doubt should be given to the party with the objective evidence as the written promissory note, rather than allowing the self-serving statements of an interested party.

C. THAT THE COURT'S INSTRUCTION NO. 2 AND SPECIAL VERDICT NO. 1 WERE IN ERROR AND MISLEAD THE JURY.

Jury Instruction No. 2 (R. 100) did not correctly state the law as it should be applied to the instant case. The evidence concerning the unauthorized completion and signing of the promissory note in blank was not competent evidence and should have been excluded in accordance with Section 78-24-2 UCA 1953. The instruction allowed the jury to base its verdict on the self-serving statements of defendants that the note was blank and that it was completed without their authorization. The only evidence from which the jury could have based its findings was evidence of a transaction or matter of fact "equally within the knowledge of both the witness and ..... the deceased person" and was therefore as a matter of law incompetent evidence There is no possibility of plaintiffs' proving that there was an authorized completion of the note to counter defendants' evidence because of the death of Glen S. Humpherys. The instruction was duly objected to by plaintiff upon the above grounds. (T. 68)

Question No. 1 of the special verdict (R. 113) was objected to by plaintiff on the same grounds. (T. 68) There was no evidence presented to the jury which was competent in

accordance with the dead man's statute. In view of this, there was no evidence upon which an affirmative answer could be supported at law. Without the testimony of defendants that the note was signed in blank, the note appeared to be complete and regular upon its face and the jury could not as a matter of law find that there was a "fraudulent and material alteration". In such case, the note should have been enforced as written.

In a similar situation involving a question of lack of consideration, the Utah Supreme Court has applied Section 78-24-2 UCA 1953. In that case, Burk vs. Peter, 202 P2d 543, 115 Utah 58, the administratrix commenced an action to enforce a promissory note and the makers of the note attempted to testify regarding the defense of lack of consideration as did defendants in the instant case. The Supreme Court affirmed the trial court's exclusion of the evidence on lack of consideration, stating the following:

> "The court therefore did not err in refusing to allow appellant to testify concerning the alleged lack of consideration for the execution of the note since such fact was equally within the knowledge of appellant and deceased...." (emphasis added)

The defense of lack of consideration is set forth in Section 70A-3-408 UCA 1953 and is treated in a similar manner as is the defense of material alteration, that is, each defense is effective against one not a holder in due course but cannot be asserted against a holder in due course. The dead man's

statute should apply to both defenses in the same manner and evidence as to either lack of consideration or material alteration should be excluded where such evidence was equally within the knowledge of the defendants and the deceased as was done in Burk vs. Peter, supra.

The comment made by the jury on the verdict further indicates their confusion as to the law and is based upon evidence offered by defendant relating to left over items purchased by defendants which evidence was clearly excluded by the court during the trial. In addition, the statement was not responsive to any question asked of the jury and was not in accordance with any instructions given the jury.

Based upon the jury's answer to special interrogatory No. 2, defendants have paid $12,496.93 on the principal of the note. The principal on the face of the note is $25,190.74. In view of this, the unpaid balance of the promissory note is $12,693.81, and judgment should be entered against defendants for such amount.

II

THE PLAINTIFFS' MOTION TO SET ASIDE THE JUDGMENT AND FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED

A. THE NEWLY DISCOVERED EVIDENCE WAS DETERMINATIVE OF THE CASE.

The Affidavit of Nanette Dixon (R. 159) described the efforts made to find the inventory to prove the value set

forth on the promissory note and to show that the terms of the agreement had been complied with. As her affidavit discloses, she searched every conceivable place where such an inventory was likely to be prior to the trial. This was over a period of three years.

The affidavit of G. Don Kennedy, the man who actually supervised the taking of the inventory, indicates that he was contacted several years prior to the trial in an effort to find the inventory and to verify the amounts.

The items constituting the inventory and attached to Mr. Kennedy's affidavit were eventually found in a hunting closet in a small box hidden in the back of and between two shelves. The items they were with were in no way related to the decedent's personal papers or drug store business. There was no advantage to or benefit for plaintiff to have not produced the items at the trial. Plaintiffs knew before the trial that the inventory items were an important element of the case and had no reason not to produce or try to locate such items prior to trial.

The newly discovered evidence consisted of adding machine tapes, a diagram and a summary of the inventory taken by the Rocky Mountain Wholesale Inventory crew of the deceased Glen S. Humphrey's drug store in accordance with the agreement Exhibit P-3. The affidavit of G. Don Kennedy, who was one of the people who took the inventory in question, (R. 162) identifies the documents as those taken in accordance with the

Agreement Exhibit P-3. This evidence is crucial to plaintiffs case as it is the proof of the inventory required in accordanc with agreement P-3 to establish the value for the deferred pay ments provided in the agreement and set out in the Note, Exhib P-2. Thus, if in fact the note were signed in blank, the inventory taken by the independent inventory crew would establish the authority to complete the note in accordance with the inventory.

It should be noted that the inventory reflects a total value of the inventory of the drug store to be $31,190.74 Defendants introduced certain checks at the trial as defendants Exhibit No. 12. One of the checks, Number 10164, marked defend ants' Exhibit No. 6, of Mack's Pharmacy, was signed by defendan William M. Stoddard and dated 12/30/67 was in the amount of $6,000.00. The date corresponds with the date of the promissor note, plaintiffs' Exhibit No. 2, and the face of the note equal the Inventory of $31,190.74, less the $6,000.00 down payment, or $25,190.74. Plaintiffs' Exhibit No. 4 reflects the $6,000.0 payment on December 30, 1967.

The new evidence provides proof of the inventory and the amount upon which the sale of Glen's Rexall Drug was based. These items provide the information which the memorandum decisi stated was necessary to support the completion of the promissor note in question.

In his memorandum decision (R. 181) dated November 5, 1979, the trial judge stated:

"The Court is also of the opinion that the newly discovered evidence would not change the verdict of the jury. The fact that an inventory may have been made would not be evidence that it had been received and agreed to by defendants."

The Agreement, Exhibit P-3, states in part as follows:

"1. That an inventory of all of said items shall be taken by a crew known as THE ROCKY MOUNTAIN WHOLESALE INVENTORY CREW on the 31st day of December, 1967. Said inventory so taken shall keep separate the prescription items which include the bottles, vials, etc., and pharmaceutical supplies used in the sale of prescriptions as one item, so that the value thereof may be determined separately and the balance of all of the merchandise shall be kept in another separate group.

"2. That the prescription items and the values thereof, when so determined, shall be paid for at the amount determined immediately after the taking thereof. That the value of the balance of the items taken, when so determined, shall be divided by twelve (12) and one-twelth (1/12th) of said amount shall be paid each month commencing with the 1st day of February, 1968, and to continue thereafter each month until a year has past; granting to the purchasers, however, a grace period of ten (10) days from each due date, each month."

There is no language in the Agreement indicating that defendants must agree to the inventory taken. It states that the amount determined by the inventory shall be divided by 12 to determine payments. Thus, the agreement would provide the authority to complete the promissory note.

In addition, the proof of the inventory provides the consideration for the note and substantiates the amount claimed to be due to plaintiff and is, therefor, determinative of the case.

B. BASED UPON THE DISCOVERY OF NEW EVIDENCE WHICH BY DUE DILIGENCE COULD NOT HAVE BEEN DISCOVERED.

Rule 60 of the Rules of Civil Procedure provides that relief may be granted from a final judgment where "....(2) newly discovered evidence which by due diligence coul not have been discovered in time to move for a new trial under Rule 59b....", and "...(7) any other reason justifying relief from operation of the judgment. The motion shall be made within a reasonable time and for reasons.....(2).... not more than three months after judgment, order or proceeding was entered or taken."

Plaintiffs' motion based upon Rule 60(a) was filed on March 2, 1979, within the three month period (R. 135) of the entry of the final order and was thus timely. The importance of the evidence has been previously stated in II A above. With respect to the requirement of due diligence, plaintiff Nanette Dixon filed an Affidavit (R. 159), in which she indicated she began searching for the inventory at about the time defendant stopped making payments (November 1975); that she spent several days devoted to the search of her father's effects; that she contacted one of the men who did the inventory, but was advised that no record was maintained and that the only records were given to Mr. Humpherys; that she again searched, but was unable to locate the inventory documents; that before the trial she again searched without

success; and that after all these searches she found the inventory of February 3, 1979, in an old hunting closet among items unrelated to the drug store or other business items, in a location in which she had to bend down to see because of its location on the back of a shelf.

In the trial judge's memorandum, he states (R. 181):

> "The new evidence had been removed from a safe and stored in a box in a closet...."

This statement is not supported by the evidence. In the plaintiff's affidavit, she stated:

> "In a wooden hunting closet containing some shelves with boxes on them and a regular wardrobe holding hats, old coats and an old jigsaw puzzle box containing items removed from an old safe and noticed in the back part of one shelf a small box which she would not have seen if she had not been bending down. Upon opening this box she discovered a diagram, adding machine tapes, and keys to the safety deposit boxes."

The only evidence as to the location of the items was the affidavit and does not say the items were ever in the safe as indicated in the memorandum decision, but that the items in question were near some items removed from an old safe.

It was never in plaintiffs' interest to fail to locate the items making up the inventory, as their presence at trial could only help the plaintiffs' case. Plaintiff's description of the many searches over the three years, the contact with Mr. Kennedy before trial (R. 163), and the finding of the inventory in such an unlikely location all indicate due diligence as contemplated by Rule 60 for relief from a judgment.

C. BASED UPON OTHER REASON JUSTIFYING RELIEF FROM THE OPERATION OF THE JUDGMENT.

The newly discovered evidence provides absolute independent proof of the value of the drug store inventory transferred to defendants as a part of the transaction during which Exhibits P-2 and P-3 were executed. It proves the authenticity of the amount of the note and is the basis for the authority granted by the agreement to complete the note if it was in fact signed in blank. Considering the weight the new evidence must be given, it would change the result of the case and in the interest of justice, a new trial should be granted so that the new evidence may be considered.

III

THE JURY'S FINDING AS TO ATTORNEY'S FEES WAS NOT SUPPORTED BY THE EVIDENCE.

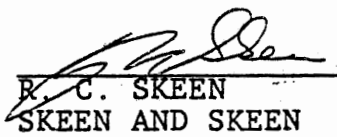
The jury's findings as to attorneys' fees were not supported by the evidence. The only evidence admitted and which the jury had available for consideration was that a reasonable attorneys' fee for enforcing the promissory note was $3,320.00. When this evidence was admitted there was no cross-examination and the defendants introduced no evidence to contradict the services, reasonableness or amount of fee. Thus, the jury's verdict of zero was not supported by any evidence.

CONCLUSION

It is respectfully submitted that the plaintiffs were entitled to recover, based upon the proof of the defendants having signed the promissory note in question, there being no competent evidence to give rise to a defense or to support the jury's verdict that there was a fraudulent and material alteration. Plaintiff is therefore entitled to a judgment for $12,693.81 representing the unpaid balance of the note, $3,320.00 attorneys fees, costs, and interest at the rate of six percent (6%) per annum.

In the alternative, plaintiff is entitled to a new trial in which to present the newly discovered evidence.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing Brief of Appellant was mailed to Defendants-Respondents' attorney, postage prepaid, addressed as follows:

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on this _____ day of _____, 1980.

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